



STATE OF INDIANA

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January 29, 2013

Mr. Brian Vukadinovich
1129 E. 1300 N.
Wheatfield, Indiana 46392

Re: Informal Inquiry 12-INF-52; Hanover Community School Corporation

Dear Mr. Vukadinovich:

This is in response to your informal inquiry regarding the actions of the Board of the Hanover Community School Corporation ("Board") and its compliance with the Open Door Law ("ODL"). Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on the applicable provisions of the ODL, I.C. § 5-14-1.5 *et seq.* William S. Kaminski, Attorney, responded on behalf of the Board. His response is enclosed for your reference.

BACKGROUND

In your informal inquiry you provide that the Board placed School Superintendent Carol Kaiser on administrative leave in late 2012. The Board has stated in previous meetings that Ms. Kaiser would remain on administrative leave until the January 2013 Board meeting. However, on December 28, 2012, the Board held a special meeting where it voted to accept Ms. Kaiser's resignation and approve her severance package. You note that only three of the five members of the Board were in attendance at the December 28, 2012 meeting and the meeting lasted less than thirty seconds. You provide that the Board did not discuss the issue prior to holding the vote, nor was any information given to the public. After the meeting, you requested from the Board's attorney a copy of the severance agreement, whereupon the attorney provided that Ms. Kaiser had yet to sign the agreement and failed to provide you with a copy. You further note that the attorney refused to discuss the terms of the agreement with the local media. You allege that the Board's action of ratifying an alleged severance agreement that was not signed by all parties was illegal. You maintain that on January 1, 2013, two current members of the Board will be replaced; to which the new Board is now saddled with the last minute actions of its predecessor.

In response to your informal inquiry, Mr. Kaminski advised that there is no restriction in the ODL, the Board's bylaws, or in Robert's Rules of Order that prohibit the Board from holding a meeting concerning a single issue or that would require a

governing body to discuss an issue prior to taking final action. The Board properly motioned and seconded the action and the vote was taken in an open, public meeting. A copy of the agenda and minutes from the December 28, 2012 meeting are attached.

ANALYSIS

As an initial matter, I.C. § 5-14-4-10 provides that the public access counselor has the authority to issue advisory opinions to interpret the public access laws upon the request of a person or public agency. Issues that you have raised in your informal inquiry regarding the legal authority of the Board to ratify an unsigned severance agreement are outside the purview of this office. As such, I will only address those issues raised in your formal complaint that allege violation of either the ODL or the Access to Public Records Act (“APRA”). I would also note that the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.*

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See I.C. § 5-14-1.5-1.* Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See I.C. § 5-14-1.5-3(a).*

A meeting is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See I.C. § 5-14-1.5-2(c).* “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See I.C. § 5-14-1.5-2(d).* “Public business” means any function upon which the public agency is empowered or authorized to take official action. *See I.C. § 5-14.1.5-2(e).*

The ODL requires that public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See I.C. § 5-14-1.5-5(a).* The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See IC § 5-14-1.5-5(b)(1).* While the governing body is required to provide notice to news media who have requested notices nothing, requires the governing body to publish the notice in a newspaper. *See I.C. § 5-14-1.5-5(b)(2).*

The ODL provides no guidelines for the content or structure of a meeting agenda, and this office has indicated that an agenda can take essentially any form. *See Opinions of the Public Access Counselor 04-FC-02 and 08-FC-17.* A governing body of a public agency is not required to use an agenda, but if it chooses to utilize one, the agency must post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. *See I.C. § 5-14-1.5-4(a).* If a public agency utilizes an agenda, the ODL does

not prohibit it from changing or adding to the agenda during the meeting. *See Opinions of the Public Access Counselor 04-FC-166; 09-FC-40; and 12-FC-43.* Further, the ODL does not require that a governing body to deliberate prior to final action being taken. “Final action” is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See I.C. § 5-14-1.5-2(g).* However, a rule, regulation, ordinance, or other final action adopted by reference to the agenda number or item alone is void. *See I.C. § 5-14-1.5-4(a).*

As applicable here, the Board held a special meeting on December 28, 2012. You have indicated that the three (3) of the five (5) members of the Board were in attendance. Thus a “meeting”, as defined by the ODL, was held by the Board on December 28, 2012 as a majority of the members of the body gathered to take official action on public business. It has not been alleged that the Board failed to provide proper notice for the meeting nor would the Board violate the ODL by holding the meeting on December 28, 2012 as opposed to January 2013. As noted *supra*, the ODL does not require a governing body to deliberate prior to taking final action and as a general rule, the ODL does not guarantee a right of the public to speak at a meeting. *See Opinions of the Public Access Counselor 08-FC-149, 10-FC-240, 12-FC-256.* Further, the ODL does not place minimum time limits for meetings held by a governing body. From what has been provided, the Board in voting to accept Ms. Kaiser’s resignation and ratify her severance agreement did not take final action by solely making reference to an agenda or item number. Thus, the Board did not violate the ODL in regards to its December 28, 2012 meeting.

You provide that after the meeting was adjourned, you made an oral request of the Board’s attorney for a copy of the severance agreement. A request for records may be oral or written. *See I.C. § 5-14-3-3(a); § 5-14-3-9(c).* If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See I.C. § 5-14-3-9(a).* A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See I.C. § 5-14-3-9(c).* Thus, at a minimum, the Board would have been required to orally acknowledge your oral request within twenty-four hours of its receipt.

As to the actual production of the agreement, effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See I.C. § 5-14-3-3(b).* The public access counselor has stated that factors to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the

disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

Thus, the Board would be required to either produce a copy of the severance agreement or cite to the statutory authority that would authorize it to withhold the agreement within a reasonable period of time. You have provided in prior communications with the Public Access Counselor's Office that you have now been provided with a copy of the severance agreement that was requested. As a matter of reference for all parties, the APRA would not allow the Board to withhold the severance agreement in response to your request simply because it had not been signed by all parties. As the APRA does not require "instant access" to records that are requested and the Board produced a copy of the severance agreement on approximately January 8, 2013, it is my opinion that the Board complied with the section 3(b) of the APRA in providing all records in a reasonable period of time.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: William S. Kaminski